No. 89-1604

Supreme Court, U.S.
FILED
JUL 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

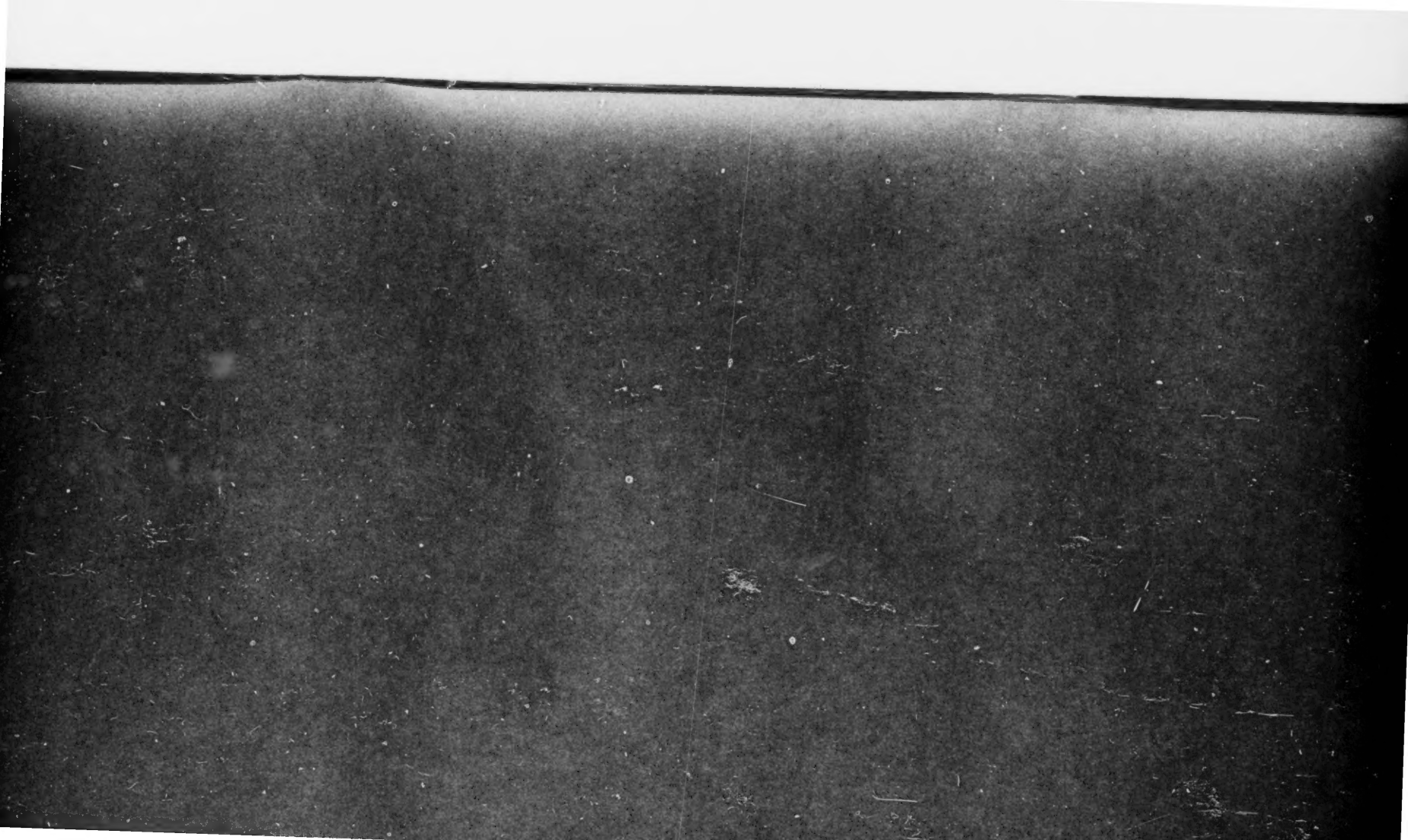
ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON

RESPONDENTS' BRIEF IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
JEROME LIDZ
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondents

*Counsel of Record

BEST AVAILABLE COPY



QUESTION PRESENTED

Are plaintiffs "prevailing parties" for purposes of awarding attorney fees under 42 U.S.C. § 1988 when the state supreme court affirms the judgment for plaintiffs on their state claim but holds that their federal rights were *not* violated because state law adequately protected plaintiffs' rights?

TABLE OF CONTENTS

Page

Question Presented i

Jurisdiction 1

Reasons to Deny Certiorari 3

I. Petitioners' question presented is not presented by this case. 3

II. Procedurally and Factually, this Case is a Poor Vehicle for Review of the Issue Presented by the Petition. 13

Conclusion 21

TABLE OF AUTHORITIES

Page

Cases Cited

Alaska Airlines, Inc. and USAir, Inc. v. Dept. of Revenue, State of Oregon, (No. 89-346) 1

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 15,16

Chastang v. Flynn & Emirch Co., 541 F.2d 1040 (1976) 18

City of Gary v. Redmond, 489 N.E.2d 543 (Ind. App. 1986) 8,11

Clements v. Fashing, 457 U.S. 957 (1982) 15,16

Cole v. Violette, 319 U.S. 581 (1943) 2-3

Delaware v. VanArsdall, 475 U.S. 673 (1986) 10

Department of Banking v. Pink, 317 U.S. 264 (1942) 3

Deras v. Myers, 272 Or. 47, 535 P.2d 541 (1975) 8,11

Dickman v. School Dist. No. 62C, 232 Or. 238, 366 P.2d 533 (1961) 11

Felder v. Casey, 487 U.S. 131 (1988) 6

Green v. Mansour, 474 U.S. 64 (1985) 17,18

Hagans v. Lavine, 415 U.S. 528 (1974) 6

Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980) 8

Heath v. Brown, 807 F.2d 1229 (5th Cir. 1987) 7-8

Hewitt v. SAIF, 294 Or. 33, 653 P.2d 970 (1982) 5

J & J Anderson, Inc. v. Erie, 767 F.2d 1469 (10th Cir. 1985) 17

Jackson v. Inhabitants of the Town of Searsport, 456 A.2d 852 (Me. 1983) 6,9,11

Kreutzer v. County of San Diego, 153 Cal.App.3d 62, 200 Cal. Rptr. 322 (1984) 18-19

Luria Bros. & Co. v. Allen, 672 F.2d 347 (3d Cir. 1982) 8

Maher v. Gagne, 448 U.S. 122 (1980) 3,4,6 10,16

Maine v. Thiboutot, 448 U.S. 1 (1980) 6

TABLE OF AUTHORITIES—Continued

Page

Cases Cited—Continued

Massachusetts v. Upton, 466 U.S. 727 (1984) 5

Michigan v. Long, 463 U.S. 1032 (1983) 10

Misuraca v. Perales, 120 A.D.2d 592, 501 N.Y.S.2d 907 (1986) 8

Moran v. Pima County, 145 Ariz. 183, 700 P.2d 881 (1985) 19

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 18

Naprstek v. City of Norwich, 433 F.Supp. 1369 (N.D. N.Y. 1977) 18,19

Oregon State Police Assn. v. State of Oregon, 308 Or. 531, 783 P.2d 7 (1989) 3,4

Parratt v. Taylor, 451 U.S. 527 (1981) 11

Raley v. Fraser, 747 F.2d 287 (5th Cir. 1984) 8

Reel v. Arkansas Department of Correction, 672 F.2d 693 (8th Cir. 1982) 8

Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980) 18

Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) 8-9

Roberts v. Mills, 290 Or. 441, 622 P.2d 1094 (1981) 5

Russo v. State of N.Y., 672 F.2d 1014 (2d Cir. 1982) 8

Smith v. Robinson, 468 U.S. 992 (1984) 4,6,7

Society of Prof. Journalists v. Briggs, 687 F.Supp. 1521 (D. Utah 1988) 18

Spencer v. South Carolina Tax Com'n, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court* 471 U.S. 82 (1985) 9,19

State ex rel. Juvenile Department v. Geist, 310 Or. ___, ___ P.2d ___ (July 17, 1990) 11

State v. Caraher, 293 Or. 741, 653 P.2d 742 (1982) 10

TABLE OF AUTHORITIES—Continued

Page

Cases Cited—Continued

State v. Spencer, 289 Or. 225, 611 P.2d 1147 (1980) 11

State v. Wagner, et al., (No. 89-1867) 1

Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1983) 5,10

Suess Builders v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982) 5,11-12

Tiffany v. Arizona Interscholastic Ass'n, Inc., 151 Ariz. 134, 726 P.2d 231 (1986) 8

U.S. Civil Service Comm. v. Natl. Asso. of Letter Carriers, 413 U.S. 548 (1973) 15,16

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 15-16

Wachsman v. City of Dallas, 704 F.2d 160 *reh. in banc denied* 710 F.2d 837 (5th Cir.), *cert. denied* 464 U.S. 1012 (1983) 15

Will v. Michigan Dept. of State Police, ___ U.S. ___, 109 S.Ct. 2304 (1989) 13

Statutory Provisions

28 U.S.C. § 1257(a) (1988) 2

28 U.S.C. § 2101(e) (1988) 1

42 U.S.C. § 1988 (1982) ..... passim

O.C.L.A. § 91720 14

Or. R. App. P. 14.05(2) 1

Or. R. App. P. 14.05(3) 1

Or. R. App. P. 14.10 2

Or. Rev. Stat. § 181.280(2) 14

Or. Rev. Stat. § 181.290 14

Or. Rev. Stat. §§ 181.290 to 181.350 14

Or. Rev. Stat. § 181.400 14

Or. Rev. Stat. § 181.400(2) 13

Or. Rev. Stat. § 182.090 8

TABLE OF AUTHORITIES—Continued

Page

Statutory Provisions—Continued

Oregon Code § 67-2619 14

1931 Oregon Laws, ch. 139, § 19 14

1971 Oregon Laws, ch. 267, § 25 14

Other Authorities

Friesen, *Recovering Damages for State Bills of Rights Claim*, 63 TEX. L. REV. 1269 (1985) 19

Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) 5

Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) 5

Linde, *Without "Due Process"*, 49 OR. L. REV. 125 (1970) 12

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

There is some doubt about the Court's jurisdiction to review the case at this stage. Petitioners' jurisdictional statement is not adequate to identify that concern, so respondents offer the following to supplement the petition.

Under 28 U.S.C. § 2101(e) (1988), the Court has jurisdiction to review final "judgments" of the state courts in civil cases. Oregon's procedures for issuing appellate judgments are somewhat novel and, indeed, have created uncertainty for the Court and for Oregon litigants on prior occasions.[1] Under Oregon practice, the appellate judgment issues after the date of the decision, and the decision is not effective until that time. Or. R. App. P. 14.05(2). The judgment consists of the appellate court decision together with a final order and seal of the court; it issues only after expiration of all relevant periods for seeking further review or reconsideration and for filing motions for attorney fees. Or. R. App. P. 14.05(3). The Oregon appellate rules also contemplate a stay of issuance of the appellate judgment pending action on the case by the

---

[1] *E.g., Alaska Airlines, Inc. and USAir, Inc. v. Dept. of Revenue, State of Oregon*, (No. 89-346)(Special letter from Court staff asking petitioners to identify effective date of judgment. Response, with accompanying documentation from Oregon appellate court clerk's office, explained that the date of appellate judgment was not the same as the decision date, but instead was controlled by the date on which the document denominated "appellate judgment" was issued by the State Court Administrator. Following response, Court ruled on petition for writ of certiorari filed six months after decision date, but within 90 days of appellate judgment); *State v. Wagner, et al.*, (No. 89-1867)(Protective motion for extension of time to file petition to ensure that time for filing petition would run from date of appellate judgment, rather than date of appellate decision. Motion described in detail Oregon practices for issuing appellate judgments and took the position that under Oregon practice, issuance of appellate judgment, rather than decision date, controls time for filing the petition).

United States Supreme Court. Or. R. App. P. 14.10. Thus, under Oregon practice, there is no appellate judgment until some indefinite time after the date of decision. Anomalously, in some instances no appellate judgment issues at all, in anticipation of review by this Court.

In this case, no final appellate judgment has issued or become effective. The Oregon Supreme Court announced its decision on November 30, 1989. Pet. Cert. App. B. Petitioners thereafter timely filed a petition for reconsideration, which the Oregon Supreme Court denied on January 11, 1990. Pet. Cert. App. A. Within 90 days of the denial of the petition for reconsideration, petitioners filed their petition for writ of certiorari. *See* 28 U.S.C. § 1257(a) (1988). On April 23, 1990, the Oregon Supreme Court received this Court's notification that a petition for writ of certiorari had been filed in this case. The Oregon Supreme Court has declined to take any further action pending disposition of the petition.

The lack of an appellate judgment in this case at most renders the petition premature. Whether the state court's failure to issue an effective judgment interferes with the Court's jurisdiction, at least under the circumstances presented by this case, is less than clear. When the Oregon Supreme Court denied petitioners' petition for reconsideration, the adjudication by the state's highest court was all but complete. All that remained was for the State Court Administrator to issue the "appellate judgment." That act has not been performed, not because there are other events to transpire before the state court's resolution of the case is final, but apparently only because the state court is awaiting this Court's disposition of the petition for certiorari. Of course, whether the absence of a document which the state court denominates a judgment interferes with the Court's jurisdiction is a matter for the Court itself to determine. *See Cole v.*

Violette, 319 U.S. 581, 582 (1943). Respondents would agree in this case, at least in light of the order denying reconsideration, that the Oregon courts have fully adjudicated the rights in question and that no further meaningful state court review is available. *See ibid*; *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). Also, respondents claim no prejudice from the Court's consideration of the petition at this juncture.

REASONS TO DENY CERTIORARI

I. Petitioners' Question Presented is not presented by this case.

Petitioners and respondents disagree less on the proper construction of 42 U.S.C. § 1988 (1982) than on the nature of the decision which petitioners ask this Court to reverse. In their Question Presented and throughout their petition, petitioners assert that the Oregon Supreme Court failed to reach their federal claim. They argue that, because they obtained relief on their claim under the Oregon Constitution, they are prevailing parties and entitled to attorney fees under 42 U.S.C. § 1988, as construed in *Maher v. Gagne*, 448 U.S. 122 (1980), even though they did not prevail on their federal claim. Petitioners assume that this case is virtually indistinguishable from *Maher*, and they describe the Oregon court as a minority of one in its refusal to award them attorney fees for the allegedly unresolved federal claim.

There are at least two fundamental flaws with petitioners' approach. First, the Oregon Supreme Court clearly *did* decide petitioners' federal claim, albeit only for purposes of resolving their attorney fee claim, and concluded that "the state did not deny them any federal constitutional rights." *Oregon State Police Assn. v. State of Oregon*, 308 Or. 531, 538, 783 P.2d 7 (1989). Second, even if petitioners' characterization of the Oregon court's decision were correct, they gloss over substantial differences between this case and *Maher v. Gagne*, *supra*,

and they ignore aspects of their federal claim which cast considerable doubt on its substantiality. Thus, the issues which this case could present are markedly different from the issue petitioners argue. Moreover, this case is not a good one to resolve even those questions which petitioners could, but do not, present to this Court.

A. The Oregon Supreme Court reached and resolved the federal claim.

Petitioners' entire argument turns on their assumption that the Oregon court failed to reach their claim under the first amendment to the United States Constitution. *See, e.g.*, Pet. Cert. at pp. i, 13, 24 and 24-26 n.17. Because plaintiffs unquestionably prevailed on their state law claim, they assert that this Court's analysis of 42 U.S.C. § 1988 in *Maher, supra*, and *Smith v. Robinson*, 468 U.S. 992 (1984), renders petitioners prevailing parties for purposes of section 1988.

Petitioners' argument starts from a false premise. The Oregon Supreme Court did not hold merely that it was unnecessary to reach petitioners' federal claim because they prevailed on their state constitutional claim. Instead, the court expressly stated that it would consider petitioners' federal claim "to the extent necessary to resolve" the attorney fee issue, *Oregon State Police Assn. v. State of Oregon*, 308 Or. at 537, and it proceeded to decide the merits of that claim:

> [T]he state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law. . . . In this case, state remedies are adequate to protect plaintiffs' rights. *Therefore, the state did not deny them any federal constitutional rights.*

Id. at 538 (citations omitted, emphasis added). The Oregon Supreme Court's clear statement that the state did not deny petitioners any federal constitutional rights is squarely at odds with petitioners' assertions that the Oregon court failed to reach their federal claim, and it removes the foundation for

petitioners' claim that they were prevailing parties under section 1988.

The difference between the Oregon court's decision and petitioners' characterization of it is not a mere slip of the court's pen. Nor is the Oregon court's holding simply another way of saying that it declined to reach petitioners' federal claim. The theory that the state does not violate federal rights when state law affords relief on a claim arising from the same operative facts is well established in Oregon jurisprudence. In *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), the Oregon Supreme Court stated:

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

Id. at 614, *quoted with approval in Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (Stevens, J., concurring in the judgment). *See also Suess Builders v. City of Beaverton*, 294 Or. 254, 267, 656 P.2d 306 (1982); *Hewitt v. SAIF*, 294 Or. 33, 42, 653 P.2d 970 (1982); *Roberts v. Mills*, 290 Or. 441, 447, 622 P.2d 1094 (1981).[2] In light of the Oregon court's repeated assertion of this theory, it is impossible to read its opinion in this case as declining to reach the merits of petitioners' first amendment claim.

Because petitioners have mischaracterized the nature of the Oregon court's decision, this case does not present the

---

[2] *See also* Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980). (The author of the law review articles was, at the time, an associate justice of the Oregon Supreme Court).

issue which petitioners ask this Court to resolve. Contrary to petitioners' assertion, the Oregon court actually decided the merits of petitioners' federal claim and rejected it; *Maher v. Gagne*, *supra*, and the line of cases applying its reasoning therefore are simply inapposite.[3] To prevail on their section 1988 claim, petitioners would have to show that the Oregon court erroneously evaluated the merits of their federal claim. That showing would lead immediately to a discussion of constitutional theories about relationships between state and federal courts and the interaction between state and federal grounds of decisions. Those constitutional issues are far removed from the section 1988 question which petitioners purport to address.

B. Petitioners are not prevailing parties for purposes of section 1988.

Respondents acknowledge that section 1988, as construed by this Court, binds the state courts. *Felder v. Casey*, 487 U.S. 131 (1988); *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980). This Court has stated the general rule governing section 1988 claims in federal court: "when the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate." *Smith v. Robinson*, 468 U.S. at 1002; *see also Maher v. Gagne*, 448 U.S. at 132-33. By

---

[3] The petition assumes that petitioners' federal claim was sufficiently "substantial" under *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974), to make them prevailing parties under the *Maher* rationale. There is a significant question, however, whether the *Hagans* substantiality test should apply to federal claims filed in state court. *See Jackson v. Inhabitants of Town of Searsport*, 456 A.2d 852, n.13 (Me. 1983) (*Hagens* standard is merely a threshold test of federal court's Article III power to hear case. Grafting the *Hagens* standard on to the retrospective inquiry of whether a party has prevailed for purposes of section 1988 has scant support in logic. The argument that the *Hagans* standard is appropriate because federal courts are familiar with it has no justification at all when a state court hears pendent federal claims).

authorizing a fee award for an unaddressed constitutional claim, Congress intended "to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive." *Smith*, 468 U.S. at 1007. That rationale has no application, of course, if the court reaches the constitutional claim and decides it adversely to plaintiff. And even where the court declines to reach the constitutional question, fees should not be awarded if the fee-generating claim has nothing to do with plaintiff's success. *Smith*, 468 U.S. at 1009 n.2.

As plaintiffs acknowledge, where a court rules in favor of a plaintiff's state law claim and goes on to reject the federal claim on its merits, plaintiff is not a prevailing party and is not entitled to attorney fees under section 1988. Pet. Cert. pp. 25-26 n.17. That is precisely what happened in this case. Respondents have found no decision holding that a plaintiff who prevails on a state law claim but loses on the federal claim is nonetheless a prevailing party for purposes of section 1988. The Fifth Circuit has clearly articulated the distinction:

> A party who prevails on both state and appropriate federal claims is a "prevailing party" within the meaning of § 1988. Furthermore, a party who wins only a pendent state claim may be a "prevailing party" under § 1988 if the court has avoided a substantial constitutional claim in the case. . . . But a party who wins pendent state claims while *losing* all federal claims is not entitled to fees. *McDonald v. Doe*, 748 F.2d 1055, 1057 & n. 13 (5th Cir. 1984) (circuits are unanimous on this issue). In the case before us, the federal courts have not avoided a substantial constitutional claim; both the district court and our Court have held that the plaintiffs' federal claims are moot. Therefore, the plaintiffs can "prevail" in this case only if they prevailed on their federal claim.

Heath v. Brown, 807 F.2d 1229, 1233 (5th Cir. 1987) (citations omitted, emphasis in original) (vacating attorney fee award and remanding for factual determination of causality).[4] As the Third Circuit stated in *Luria Bros. & Co. v. Allen*, 672 F.2d 347, 357 (3d Cir. 1982): "The statute [section 1988] plainly limits fee awards to 'the prevailing party' '[in] any action or proceeding to enforce a provision of [section] 1983.' The losing party is not the prevailing party; what is black cannot be called white."

While acknowledging that the Supremacy Clause requires state courts to award attorney fees to plaintiffs who are prevailing parties under section 1988, the state courts are understandably reluctant to award fees where state law does not authorize it and section 1988 does not require it.[5] State appellate courts therefore have frequently decided the merits of the federal claim even when state law was otherwise dispositive.[6] As the Maine Supreme Court explained in a

---

[4] *See also Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984); *Reel v. Arkansas Department of Correction*, 672 F.2d 693, 698 (8th Cir. 1982); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *Russo v. State of N.Y.*, 672 F.2d 1014, 1022-23 (2d Cir. 1982).

[5] In this case, state law provided two avenues to obtain attorney fees. Or. Rev. Stat. § 182.090 authorizes courts to award attorney fees to a prevailing petitioner if the court finds that "the state agency acted without a reasonable basis in fact or law." Petitioners sought, but did not obtain, fees under this standard. In exceptional cases, the Oregon courts also award fees when a plaintiff succeeds in vindicating rights of special public importance. *Deras v. Myers*, 272 Or. 47, 66, 535 P.2d 541 (1975). Petitioners did not seek fees on that basis.

[6] *See, e.g., Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 151 Ariz. 134, 726 P.2d 231 (1986) (to determine whether trial court properly awarded attorney fees pursuant to section 1988, appellate court first decides whether trial court correctly found violation of constitutional rights); *Misuraca v. Perales*, 120 A.D.2d 592, 501 N.Y.S.2d 907 (1986) (case settled on state law claims; attorney fee award reversed, because constitutional claim wholly without merit); *City of Gary v. Redmond*, 489 N.E.2d 543 (Ind. App. 1986) (trial court awarded relief without specifying grounds; on defendant's appeal for attorney fee award, appellate court reviewed merits of federal due process claim; attorney fee award reversed); *Right to Choose v. Byrne*, 91 N.J. 287,

(Footnote continued on next page)

thoughtful opinion in *Jackson v. Inhabitants of the Town of Searsport*, 456 A.2d 852, 856 (Me. 1983):

> To allow attorney's fees under section 1988 to parties who assert meritless federal claims along with valid state claims would in many cases effectively abrogate the American Rule. Any person with a claim founded in state law against a state or its subdivisions would have every incentive to interject a section 1983 claim into the action regardless of its validity. We will not so easily infer as drastic an intrusion by Congress into the internal functionings of judicial systems of the several states. . . . If a federal claim under the civil rights laws has no merit, it cannot serve as the predicate for the imposition of attorney's fees simply because it is appended to a valid state claim. We must, therefore, decide if the Plaintiff in the case at bar had a meritorious claim under section 1983.

See also Spencer v. South Carolina Tax Com'n, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court* 471 U.S. 82 (1985) (attorney fees denied because "it may reasonably be inferred that the sole reason for alleging section 1983 was to justify the allowance of counsel fees").

The Oregon Supreme Court's decision in this case thus accords with numerous decisions holding that, when the court reaches the federal claim and decides it adversely to plaintiffs, plaintiffs are not prevailing parties under section 1988, despite a victory on a state law claim. Petitioners here have not argued that the Oregon court erred by reaching their federal claim, and respondents have found no case holding

---

(Footnote continued from previous page)

450 A.2d 925 (1982) ("section 1988 permits an award of counsel fees to a party who prevails on a state claim only when the federal claims are adjudicated favorably for that party or not adjudicated at all;" reversing trial court's rulings both on merits of federal claim and on attorney fees.)

that it is error to decide the federal claim on its merits in order to adjudicate the request for attorney fees.[7]

C. The theory underlying the Oregon court's decision is not sufficiently developed for this Court's review.

Because the Oregon court properly reached the merits of the federal claim in order to resolve petitioners' claim for attorney fees, petitioners can prevail only if they establish that the Oregon court decided it incorrectly. In other words, they would have to show, contrary to the Oregon court's decision, that the state violated their federal constitutional rights. Petitioners have not even begun to make that argument in this Court.

The Oregon court's analytical approach— deciding state law claims before turning to federal constitutional questions—is not in itself controversial.[8] In some cases, however, the Oregon court has gone beyond merely choosing to rest its decision on an independent state ground. It has extended the analytical approach to encompass a substantive decision that the state does not violate federally protected rights when state law affords relief. The Oregon Supreme Court's theory that "the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law," *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981), might present substantial and interesting questions in a proper case. For several reasons, however, this is not the proper case to explore the broad issues underlying the Oregon court's theory.

---

[7] Indeed, the legislative history of section 1988 implies that a court may properly reach the constitutional question if it so chooses. *See Maher v. Gagne*, *supra*, 448 U.S. at 132 n.15.

[8] Although it may sometimes be difficult to determine whether the state court decision indeed rests upon an adequate independent state ground, *see, e.g., Michigan v. Long*, 463 U.S. 1032 (1983), the analytical approach itself is widely accepted and well respected. *See generally, Delaware v. VanArsdall*, 475 U.S. 673, 701 n.10, 702 n.11, 704-05 (1986) (Stevens, J., dissenting) (discussing cases and authorities); *State v. Caraher*, 293 Or. 741, 751, 653 P.2d 942 (1982) (citing cases).

First, the petition for certiorari does not even identify the issue presented by the Oregon court's rationale, much less begin to analyze whether the Oregon court's disposition of their federal claim is correct. Second, other states have followed Oregon's lead in deciding state constitutional issues before reaching the federal ones. *See* note 6, *supra*. Respondents are aware of no other state, however, which has yet extended the analytical method to hold that the state remedy answers the federal claim as a matter of substance. If other states adopt a similar approach, their decisions will assist in defining the theory's jurisprudential moorings.

Third, and perhaps most important, although the Oregon court has repeatedly referred to the principle that state remedies may negate a federal claim, the dimensions of the doctrine are not yet clear, even in Oregon. Frequently, the court relies upon its theory simply to explain why it is unnecessary to reach the federal claim.[9] Except for this case, only rarely has the Oregon court's invocation of the "state law first" principle had any practical effect on the outcome of the case. It is not yet clear how the Oregon court will apply its theory to various types of federal claims. For instance, the theory appears unexceptionable when applied to many due process claims. *Cf. Suess Builders, Inc. v. City of Beaverton*, *supra*, (inverse condemnation claim). *See also Jackson v. Inhabitants of Town of Searsport*, *supra*, 456 A.2d at 856-60 (rejecting due process claim because state remedies were adequate, citing *Parratt v. Taylor*, 451 U.S. 527 (1981)); *City of Gary v. Redmond*, *supra*, 489 N.E.2d at 548-50 (state's post-

---

[9] *E.g.*, *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980). *See also State ex rel. Juvenile Department v. Geist*, 310 Or. ____, ____, ____ P.2d ____ (July 17, 1990) (because state law provides mother in termination of parental rights proceeding with right to adequate counsel and a procedure to vindicate that right, court "need not address" due process claim); *Deras v. Myers*, 272 Or. 47, 53, 535 P.2d 541 (1975); *Dickman v. School Dist. No. 62C*, 232 Or. 238, 245-46, 366 P.2d 533 (1961).

deprivation procedures comported with due process). But its application may be more problematical where a state official has already acted in a manner claimed to infringe upon constitutional rights; for instance, if the state has distributed free textbooks and teachers to parochial schools, state law may provide a remedy, but it does not "undo" the unconstitutional act itself.[10] Here, however, petitioners challenged a statute which the Oregon courts had not construed, which had never been enforced, which defendants did not threaten to enforce, and which was patently invalid under the Oregon Constitution. Under these circumstances, the Oregon court soundly concluded that the "state"—*i.e.*, state law taken as a whole—did not deprive petitioners of any federally protected rights. Whether that analysis comports with federal law may present a close question, but the question will be easier to resolve once the Oregon court has more clearly delineated the contours of its doctrine. In this case, the parties did not brief the issue in the way the Oregon court decided it; the Oregon court provided only a cursory explanation of its rationale; and the petitioners have failed to grapple in their petition with the state court's actual ground for decision. If the consequences of the Oregon court's decision are as far-reaching as petitioners imply, litigants in Oregon undoubtedly will join arguments on the issue in a manner that will prompt the Oregon court to elucidate its theory sufficiently for the parties and this Court to assess better its full import.

---

[10] *But see* Linde, *Without "Due Process"*, 49 OR. L. REV. 125, 134-35 (1970). Linde argues that the principle applies even as to completed conduct, by virtue of the logical relationship between the state and federal constitutions. The federal bill of rights binds the states through the due process and equal protection clauses of the fourteenth amendment. Whether the state has violated the fourteenth amendment's commands depends on what final action the state has taken. The state constitution is part of the state's law, and decisions applying it are part of the "total state action in a case." *Id.* at 133. Necessarily, a state does not violate the fourteenth amendment when the state court sets aside official action under its own constitution. *Ibid.*

II. Procedurally and Factually, This Case Is a Poor Vehicle for Review of the Issue Presented by the Petition.

Because petitioners misunderstand the state court's ground for decision, they make several assumptions about the federal claim that cannot stand given the present posture of the case. Petitioners assume that the federal question was "substantial" and otherwise properly before the state court; they assume that there are no circumstances which would justify a denial of attorney fees; and they assume that, had the Oregon Supreme Court not resolved the case on the ground that it did, the state court would have declined to adjudicate the federal claim altogether. In fact, however, were this Court to accept review, it is likely that the Court at most would vacate the judgment and return it to the Oregon Supreme Court for resolution of the many remaining questions about the federal claim.

A. The federal claim was not justiciable.

The state defendants maintained throughout this litigation that the federal claim did not raise a justiciable controversy. Given the basis for its decision, the Oregon Supreme Court did not resolve that question. The challenge to the justiciability of the federal claim, however, was well-founded.

The gravamen of petitioners' complaint sought a declaratory ruling striking down Or. Rev. Stat. § 181.400(2), which places limits on political campaign activities by police officers. The logical defendant for the action was the state itself. For purposes of the federal section 1983 claim, however, the state could not be sued. *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 2308-11 (1989) (a state is not a "person" within the meaning of section 1983).[11] Petitioners' complaint avoided this problem by suing

---

[11] The state was named as a defendant for the state declaratory judgment action, and thus is a defendant in the caption of the case.

defendant Brandaw (the State Police Superintendent) in both his official and individual capacity. *Id.* at 2311 n.10 (state official may be sued in official capacity for injunctive relief). Defendant Brandaw, however, had never attempted or threatened to enforce the statute, either before or during the lawsuit.

Indeed, there has been no known or threatened enforcement of the statute throughout its existence in Oregon. Enacted in 1931, the law in question is relatively old and has remained substantially unchanged since then.[12] Despite its long existence, it has not been cited in, much less been the subject of, any known enforcement action or appellate decision. The statute does not even contain a penalty clause, and no Oregon statute specifically authorizes a criminal or civil penalty, forfeiture, or any sanction or disciplinary action for a state police officer's political activities.[13]

---

[12] The statute, presently codified at Or. Rev. Stat. § 181.400, was originally enacted by Oregon Laws 1931, chapter 139, § 19, and was formerly codified at Oregon Code § 67-2619 and O.C.L.A. § 91720. The only pertinent amendment to the statute since its enactment was to substitute "state police" for "department" and to add the phrase "Notwithstanding any other law" to subsection (2). 1971 Or. Laws ch. 267, § 25.

[13] The only apparent sanction arises by implication through Or. Rev. Stat. § 181.290, which permits the Superintendent of State Police to "remove" a police officer for, *inter alia*, "misfeasance, malfeasance, nonfeasance in office, . . . wilful violation of any rule or regulation of the department, [or] insubordination . . . ." For that purpose, Or. Rev. Stat. § 181.280(2) authorizes the Superintendent to "[m]ake rules and regulations for the discipline and control of the state police," and Or. Rev. Stat. §§ 181.290 to 181.350 provide a required procedure governing discipline or removal of an officer.

The Superintendent for the first time promulgated rules governing political participation only after this lawsuit was filed, in what all parties would have to acknowledge was an attempt to narrow the statute so that it would be enforced, if at all, only in ways consistent with settled federal constitutional parameters. The rules drastically narrowed the statute's provisions so as to permit off-duty participation in nonpartisan political campaigns. The rules restricted only partisan campaign activities other than contributing money, expressing an opinion or attending political meetings as a member of the audience. The limitations placed on on-duty political activity were essentially the same as those that fall within Oregon's "little

(Footnote continued on next page)

Given this posture, justiciability of petitioners' federal claim is substantially in doubt, if not plainly lacking. In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court refused to resolve a broad attack on the Hatch Act's constitutionality where the record failed to disclose a "threat of interference by the [Civil Service] Commission with rights of these appellants . . . beyond that implied by the existence of the law and the regulations." *Id.* at 91. Reasoning that any interference with first amendment interests was speculative and hypothetical at best, the Court rejected as nonjusticiable the claims of all but one plaintiff. *Id.* at 89-90.[14] The only

---

(Footnote continued from previous page)

Hatch Act," which also governed plaintiffs as state employees and which plaintiffs did not challenge. Although plaintiffs maintained their first amendment challenge to the Superintendent's narrowing rule, which is the only possible basis to assert some threatened enforcement of the statute itself, they could not cite even a single case in support of that challenge. Their omission was not surprising; federal law upholding even more onerous restrictions on government employees is well-settled. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding Oklahoma restrictions on partisan activity by state employees); *U.S. Civil Service Comm. v. Natl. Asso. of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act provisions restricting federal employees from taking active part in political campaigns or their management); *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding state authority to restrict political activity participation); *Wachsman v. City of Dallas*, 704 F.2d 160 *reh. in banc denied* 710 F.2d 837 (5th Cir.), *cert. denied* 464 U.S. 1012 (1983) (upholding restrictions on nonpartisan activities by police officers and firefighters).

[14] The Court reasoned:

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Id. at 89-90 (footnote omitted).

plaintiff who presented justiciable claim had been charged with violating the Act and threatened with removal from office. *Id.* at 91-92. Since *Mitchell*, the Court has adhered to the requirement that there be an active controversy and real threat to constitutional interests before courts will adjudicate government employees' political participation rights. *See, e.g., U.S. Civil Service Comm. v. Natl. Asso. of Letter Carriers*, 413 U.S. at 554-56 (reaffirming *Mitchell*, but finding a justiciable controversy because plaintiffs alleged both that they had engaged in prohibited activity and that the commission "was enforcing, or threatening to enforce, the Hatch Act's prohibition").[15]

Because the court would lack jurisdiction over the federal claim if it is not justiciable, the justiciability dispute would have to be settled before an award of attorney fees would even arguably be due under 42 U.S.C. § 1988. *Cf. Maher v. Gagne*, 448 U.S. at 132-33 (federal court has authority to award attorney fees under section 1988 for nonconstitutional federal claim if the federal claim is sufficiently "substantial" to support the court's jurisdiction). A significant question going to jurisdiction thus remains unresolved, and it is unlikely that the Court would reach the question petitioners want answered. The most petitioners could hope for would be a remand to the Oregon Supreme Court to decide the justiciability issue. Alternatively, because justiciability is a question of law, this Court might find itself resolving the case on that ground and affirming the Oregon Supreme Court's judgment without ever reaching the question the petition seeks to present.

---

[15] *See also Broadrick v. Oklahoma*, 413 U.S. at 609 (plaintiffs had been charged with and faced dismissal for violating state's "little Hatch Act"); *Clements v. Fashing*, 457 U.S. at 961-62 (sufficient case or controversy where plaintiffs alleged that they would engage in activities but for the prohibitions *and* provisions at issue either purported to effect an automatic forfeiture of office or automatically precluded them from seeking another office).

B. Even if the Oregon Supreme Court's rationale is flawed, there are several reasons why attorney fees nevertheless should be denied in this case.

The fact that the action here was purely declaratory in nature—that is, for nearly 60 years the statute had not been enforced and there was no threat of enforcement—plagues petitioners' entitlement to section 1988 attorney fees in other ways. It casts serious doubt on the "substantiality" of the federal claim for purely declaratory and injunctive relief, and it gives the lower court ample grounds for a discretionary denial of fees.

1. Petitioners, beginning with their Question Presented and continuing through the argument in their petition, take as a given that their federal claim was properly brought and was "substantial." However, to obtain purely declaratory and injunctive relief against a state official in a section 1983 action, there must be some real threat of an on-going violation of a plaintiff's federal interests. *Green v. Mansour*, 474 U.S. 64, 73-74 (1985). Of course in this case, the challenged statute had not been enforced since its enactment, and there was no sudden interest in enforcing it. Petitioners therefore could not meet even a threshold test for declaratory and injunctive relief under section 1983, and their claim properly would have been dismissed. *Cf. J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1476-78 (10th Cir. 1985) (fees properly denied to partially successful plaintiff where alleged constitutional violation, had it gone to trial, would not have been cognizable in section 1983 action).

2. The purely declaratory nature of this lawsuit, coupled with the aging and unenforced statute that petitioners made their target, would support a discretionary refusal to award

attorney fees under section 1988.[16] Petitioners perhaps achieved a moral victory in state court, but their lawsuit resulted in no real benefit other than to have defendant Brandaw enjoined from action he had never attempted to take and had shown no likelihood of taking.[17] Even assuming petitioners could overcome the justiciability problems inherent in their suit and could meet the requirements of *Green v. Mansour*, *supra*, the state court would be justified in declining to award attorney fees for a lawsuit directed against a statute that had lain dormant for over half a century.[18]

---

[16] Lower courts generally recognize the strong congressional policy underlying section 1988 of encouraging private attorneys general to enforce fundamental constitutional rights under section 1983. *See generally, e.g., Riddell v. National Democratic Party*, 624 F.2d 539, 543-47 n.9 (5th Cir. 1980) (discussing standards for attorney fees awards and caselaw); *Society of Professional Journalists v. Briggs*, 687 F.Supp. 1521, 1523-24 (D. Utah 1988) (discussing cases). However, the lower courts have also observed that Congress expressly declined to make such awards mandatory, leaving courts the discretion to decline awards under circumstances where they would not further the interests to be vindicated by a section 1983 action. *E.g., Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1370 (N.D. N.Y. 1977). "Special circumstances" to deny fees are found generally in cases in which the benefit of the lawsuit is particularly narrow, private, or academic. *See Riddell v. National Democratic Party*, *supra*.

[17] *See Chastang v. Flynn & Emirch Co.*, 541 F.2d 1040, 1045 (1976) (citing as factor in fee denial that defendants had little control over contested discriminatory aspects of retirement plan). *See generally, Society of Prof. Journalists v. Briggs*, 687 F.Supp. 1521, 1524 n.13 (D. Utah 1988) (discussing cases denying attorney fees where defendant was powerless to provide remedy sought).

[18] *Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1370-71 (N.D. N.Y. 1977) (no award of attorney fees for declaratory and injunctive relief against law that was antiquated and rarely enforced; no constitutional rights were seriously threatened and no significant public benefit was achieved). *Accord, Nadeau v. Helgemoe*, 581 F.2d 275, 279 n.3 (1st Cir. 1978); *Kreutzer v. County of San Diego*, 153 Cal.App.3d 62, 200 Cal. Rptr. 322 (1984). The federal district court in *Naprstek v. City of Norwich*, was troubled at the prospect of encouraging federal rights lawsuits that served only a "housecleaning" purpose by clearing state and local codes of outdated statutes that were not likely to be enforced.

> [W]e will not encourage a wholesale scramble by lawyers to challenge possibly thousands of ancient and ineffectual municipal ordinances, on the expectation that counsel fees must be awarded automatically.

433 F.Supp. at 1371.

The Oregon Supreme Court's rationale points strongly in the direction of an additional basis on which the court could have, and likely would have, declined to award fees—*e.g.*, the federal claim was unnecessary to the relief obtained. Petitioners' suit was, in its purest sense, little more than a state declaratory judgment proceeding. State courts frequently find themselves confronted with state law actions dressed up as section 1983 claims, or to which a section 1983 claim is unnecessarily attached, merely as a way to generate attorney fees. State courts properly should have the latitude to deny fees where the federal claim was, in the state court's judgment, wholly unnecessary to the relief awarded. *See Spencer v. South Carolina*, *supra*, 316 S.E.2d at 388-89; *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881, 882-83 (1985); *see generally* Friesen, *Recovering Damages for State Bills of Rights Claim*, 63 TEX. L. REV. 1269, 1303-10 (1985). The view that petitioners' claim was wholly unnecessary to this lawsuit was implicit in the Oregon Supreme Court's holding. If this Court is unsure whether the Oregon court would deny fees on that basis, the case properly should be remanded to the state court for a more express determination whether the federal claim was surplusage that served no real purpose except to generate fees.

C. At most, a grant of review would result in a remand to state court so that it may decide whether to adjudicate the federal claim.

Petitioners' entire position begins with the false premise that the Oregon Supreme Court completely failed to reach their federal claim after resolving their state claim favorably. More accurately, and as discussed previously at length, the Oregon Supreme Court resolved the federal claim on the merits by concluding that there could be no federal constitutional violation where the state constitution addressed and satisfied petitioners' concerns.

If the Oregon Supreme Court's rationale were to be invalidated, the case should then be remanded to the state court to determine whether it chooses to decline to reach the federal claim altogether, or whether it wishes to adjudicate it fully. The state defendants maintained throughout this litigation that the federal claim was without merit and that the only real question was whether the challenged statute and regulations could withstand the much more protective provisions of the Oregon Constitution. The state defendants also urged that the Oregon Supreme Court should decide the scope of the first amendment's protections in this context, since the state defendants' only exposure to attorney fees was pursuant to petitioners' federal claim.

It may be that, if the Oregon court had known it could not resolve the attorney fees on the basis that it did, it would decline to reach the federal claim for the same jurisprudential reasons that cause the federal courts to avoid constitutional issues when possible. But whether the state court would opt for jurisprudential economy here is a question for the state court in the first and final instance. The Oregon court might appropriately be concerned at the prospect of forcing the state defendants to bear an award of attorney fees on the basis of an unresolved claim which they had steadfastly maintained should fail. That prospect is particularly troubling when an award of attorney fees for the state claim offends state legal policy, but federal law mandates a fee award if the federal claim is not reached. Indeed, state courts often resolve federal claims, despite adequate and independent state grounds for decision, in order to have some confidence that section 1988 attorney fees fairly should be borne by a defendant. *See* discussion *supra* at pp. 8-9 and n.6. The Oregon Supreme Court would be entitled to the opportunity to fully adjudicate the federal claim, where, as here, it did not decline to engage it, but instead choose to do so and found that no federal claim remained to be resolved.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,
DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
JEROME LIDZ
Assistant Attorney General
Counsel for Respondents